

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
BIZTEL, INC.)	FCC File Nos. 0000309573 and 0000314076
)	
For Renewal of 39 GHz Licenses for Stations)	
WMT884, Omaha, Nebraska and WPJA898, San)	
Juan, Puerto Rico)	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2003

Released: March 7, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. Introduction

1. On December 29, 2000, Biztel, Inc.¹ (Biztel) filed a renewal application for 39 GHz band Station WMT884, Omaha, Nebraska.² On January 5, 2001, Biztel filed a renewal application for 39 GHz band Station WPJA898, San Juan, Puerto Rico.³ On May 13, 2002, the Policy and Rules Branch of the Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau) requested additional information from Biztel regarding these stations to determine what action should be taken on the renewal applications.⁴ On June 13, 2002, Biztel provided this information to the Division.⁵ For the reasons set forth herein, we grant Biztel's above-captioned renewal applications.

II. Background

2. In 1996, as part of its consolidation of the rules governing common carrier and private operational Fixed Microwave Services, including the 39 GHz band, the Commission established Part 101

¹ Biztel is a wholly owned subsidiary of Teleport Communications Group, Inc., which in turn is a wholly owned subsidiary of AT&T Corp.

² See FCC File No. 0000309573.

³ See FCC File No. 0000314076.

⁴ See Letter from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, to Jane M. Vaughn, Biztel, Inc., dated May 13, 2002 (308(b) Letter).

⁵ See Letter from Thomas G. Dagger, on behalf of Biztel, to John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, dated June 12, 2002 (Biztel Reply Letter). Biztel stated that the requested information provided to the Commission contained sensitive and proprietary information and, therefore, along with providing the information, also requested confidential treatment by the Commission. Subsequently, upon the Division's request, Biztel provided a redacted copy of the reply letter on September 12, 2002.

of the Commission's Rules and adopted a ten-year license term for all Fixed Microwave Services.⁶ Prior to this change, common carrier 39 GHz band licensees were subject to a fixed term ending on February 1, 2001, while private carrier 39 GHz band licensees had five-year license terms.⁷

3. In 1997, in the *39 GHz R&O*, the Commission adopted a renewal expectancy for licensees in the 39 GHz band,⁸ and changed the build-out requirements for the 39 GHz band licenses. Prior to the *39 GHz R&O*, 39 GHz band licensees were subject to a build-out requirement of constructing at least one link in their respective geographic service areas within eighteen months of the date of license grant.⁹ As a result of the Commission's decision in the *39 GHz R&O*, a 39 GHz band licensee is required to demonstrate provision of "substantial service" in its license area as part of its application for renewal of license.¹⁰ In establishing this "substantial service" standard, the Commission intended to "ensur[e] that service is being provided to the public,"¹¹ but wanted to provide licensees "a significant degree of flexibility in meeting their performance requirement."¹² In an effort to give licensees this flexibility, the Commission rejected defining specific build-out benchmarks as "unduly restrictive and burdensome."¹³ The Commission did provide, however, a "safe harbor" example of a substantial service showing as "four links per million population within a service area."¹⁴

⁶ Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, WT Docket No. 94-148, 11 FCC Rcd 13449 (1996) (*Part 101 R&O*).

⁷ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18620-21 ¶ 36 (1997) (*39 GHz R&O*).

⁸ *Id.* at 18626 ¶ 49.

⁹ *See* 47 C.F.R. § 101.63 (1996).

¹⁰ *See* 47 C.F.R. § 101.17.

¹¹ *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

¹² *Id.* at 18623 ¶ 42.

¹³ *Id.* at 18623-24 ¶ 43.

¹⁴ *Id.* at 18624 ¶ 46. We note that, although the Commission did not use the specific term of "safe harbor" in the 39 GHz band context, we believe the Commission intended for this example to serve, in fact, as a "safe harbor." This determination is consistent with similar examples the Commission has provided in other services. *See* Amendments to Parts 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16,934, 16951-2 ¶ 38 (2000); Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-38 ¶ 70; Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19,853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 – 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12,545, 12660-1 ¶ 270 (1997); Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10,785, 10843-4 ¶ 113 (1997).

4. The Commission also noted that licensees must receive a reasonable amount of time to establish a viable operation, develop market plans, secure necessary financing, develop and incorporate new technology in their systems, accommodate equipment manufacturers' production schedules and build a customer base to meet a performance requirement.¹⁵ The Commission also noted that "any build-out standard should be based on market population or population density because market size is a reasonable proxy for gauging the appropriate comparative levels of spectrum use."¹⁶ Further, the Commission specifically declined to exempt the incumbent 39 GHz band licensees from the "substantial service" renewal showing.¹⁷

5. On December 29, 2000, Biztel filed a renewal application for its 39 GHz band Station WMT884, and on January 5, 2005, it filed a renewal application for its 39 GHz band Station WPJA898. In accordance with Section 101.17 of the Commission's Rules, Biztel attached its substantial service showings to the subject renewal applications.¹⁸ However, based upon its review of these applications and the attachments thereto, the Division, on May 13, 2002, communicated to Biztel that the Division needed additional information in order to determine whether Biztel had provided substantial service with respect to the subject stations. Biztel provided additional information on June 13, 2002.¹⁹

III. Discussion

6. In its renewal applications, Biztel indicated that since the dates of the respective license grants, it has constructed four links for Station WMT884, in the area of Omaha, Nebraska, which contains a population of 576,357,²⁰ and nine links for Station WPJA898 in the area of San Juan, Puerto Rico, which contains a population of 2,329,600.²¹ Thus, Biztel stated that it had constructed at least four links per million population, which the Commission had previously suggested would constitute substantial service.²² However, in both substantial service showings, Biztel also stated that "during the course of the license term, microwave paths have been established and dismantled."²³ In both showings, Biztel explained that this was "due to the fact that the provision of wireless local loop services changes constantly to accommodate the unique and varying demands of customers."²⁴

¹⁵ *Id.* At 18625 ¶ 47-48.

¹⁶ *Id.* at 18624 ¶ 44.

¹⁷ *Id.* At 18624 ¶ 46.

¹⁸ *See* 47 C.F.R. § 101.17.

¹⁹ *See* Biztel Reply Letter.

²⁰ FCC File No. 0000309573.

²¹ FCC File No. 0000314076.

²² *39 GHz R&O*, 12 FCC Rcd at 18624-25 ¶ 46.

²³ *See* FCC File No. 0000309573, Substantial Service Showing Attachment at 1; FCC File No. 0000314076, Substantial Service Showing Attachment at 1.

²⁴ *Id.*

7. In the additional information provided in the Biztel Reply Letter, Biztel indicates that with respect to Stations WMT884 and WPJA898, it established a point-to-point microwave network in the 39 GHz band to provide a variety of services to customers, including wireless local loop service and backhaul and backbone service for wireless service providers.²⁵ Biztel also states that rather than purchasing local access circuits from the incumbent local exchange carrier, Biztel provides microwave paths to customers, typically as a temporary solution to precede AT&T Corp.'s own fiber build-out program.²⁶ Therefore, Biztel indicates that with respect to both stations, service is dynamic rather than stable.²⁷ As a result, Biztel indicates that while at some point during the license period it had sufficient number of paths in operation to meet the safe harbor standard, all of the paths may not have been operational throughout the entire license period.²⁸

8. Based on the record before us, we believe although it did not meet the "safe harbor" standard set forth in the *39 GHz R&O* throughout the entire license period, Biztel has demonstrated substantial service in Omaha, Nebraska and San Juan, Puerto Rico during the subject license term. As provided above, the Commission has indicated that one example of a substantial service showing might consist of four links per million population within a service area.²⁹ Even though all the paths were not operational simultaneously for the entire license period, we believe Biztel has demonstrated that it constructed at least four links per million population in the service area during the license term and that Biztel was utilizing these links to provide service to the public. Moreover, we believe Biztel has sufficiently explained how it is serving the public and why all of its paths may not have been operational during the entire license period. Therefore, based on the information before us, we conclude that Biztel has demonstrated substantial service in its Omaha, Nebraska and San Juan, Puerto Rico service areas.

IV. Conclusion

9. For the reasons stated above, we conclude that Biztel has demonstrated sufficiently its provision of substantial service during the subject license terms. Thus, we conclude that grant of the renewal applications is warranted.

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *39 GHz R&O*, 12 FCC Rcd at 18624-25 ¶ 46.

V. Ordering Clauses

10. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309(d), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, the applications filed by Biztel, Inc. for renewal of the licenses for Stations WMT884, Omaha, Nebraska and WPJA898, San Juan, Puerto Rico (respectively, 0000309573 and 0000314076) ARE GRANTED.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Commission